85-905

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

* * * * *

DONALD E. SALISBURY, Petitioner,

v.

JAMES RIVER CORPORATION,
UNITED PAPER WORKERS INTERNATIONAL,
AFL/CIO and LOCAL 1010 UNITED PAPER-
WORKERS,

* * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * *

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QUESTIONS PRESENTED

1. WHETHER THE SIX-MONTH STATUTE OF LIMITATIONS OF §10(b) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. §160(b) SHOULD RETROACTIVELY BAR APPELLANT SALISBURY'S HYBRID CAUSE OF ACTION FOR BREACH OF CONTRACT UNDER §301 OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT, 29. U.S.C.§185.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

* * * * *

DONALD E. SALISBURY, Petitioner,

v.

JAMES RIVER CORPORATION,
UNITED PAPER WORKERS INTERNATIONAL,
AFL/CIO and LOCAL 1010 UNITED PAPER-
WORKERS,

* * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * * *

Sloan, Benefiel, Farrer & Newton of counsel, and Randolph McCarthy, Jr., P.C., attorneys for Donald E. Salisbury, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., infra, 1-5) is not reported. The opinions of the District Court (App. B., infra, 6-10) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A., infra 1-5) was entered on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 8, 1983 this Court decided the case of DelCostello v Teamsters, 462 US 1512 (1983). This Court established in that decision that when an employee brings suit against his employer and union under the Labor Management Relations Act of 1947, §301, 29 U.S.C. §185, the applicable statute of limitations is the six-month limitations period found in §10(b) of 29 U.S.C. §160(b), as amended.

2. On June 1, 1983, seven days prior to this Court's DelCostello decision, petitioner Donald Salisbury filed a third-party suit in the Ninth Judicial Circuit Court of the State of Michigan. The Petitioner's suit alleged that respondent James River Corporation, his employer, had wrongfully terminated his employment on August 28, 1982 and that

respondent unions, United Paperworkers Union Local 1010 and United Paperworkers International Union, AFL-CIO had unfairly represented him in the grievance procedure, all in violation of the collective bargaining agreement existing between the respondents in this case.

Petitioner Salisbury was fired by respondent employer for allegedly shooting a gun and destroying property at work in August of 1982. Petitioner Salisbury, however, had broken his right thumb during his employment on July 13, 1982 and was fired from employment while still on restricted work duty due to his broken thumb. Petitioner's employment was terminated in retaliation for sustaining a work related injury. Petitioner Salisbury timely filed a grievance of the termination of his employment with respondent local union.

Petitioner's request for arbitration of his grievance was denied by the local union membership on October 13, 1982. Petitioner Salisbury has never been advised in writing of the local union's decision not to pursue arbitration.

On July 6, 1983, the respondents removed this action to the U.S. District Court, Western District of Michigan. Respondents filed motions to dismiss asserting that the six-month statute of limitations provided for in §10(b) of the National Labor Relations Act. 29 U.S.C. §160(b) governed this action. The District Court dismissed Petitioner's claim against respondent Local 1010 and respondent International Union on January 12, 1984 finding that the six-month statute was applicable (App. B, 6-9) The District Court on April 23, 1984 dismissed Petitioner's claim for wrongful

discharge against respondent James River Corporation for the reasons expressed in its decision of January 12, 1984 (App. B 10).

On Appeal, the Sixth Circuit Court of Appeals affirmed. The Court recognized that in DelCostello v Teamsters, 462 U.S. 151 (1983) this Court established that the §10(b) statute of limitations was applicable to Federal causes of action brought in a hybrid §301 unfair representation case. The Court of Appeals concluded that pursuant to its decision in Smith v General Motors Corp., 747 F2d 372 (6th Cir. 1984) (en banc), the DelCostello decision was to be given retroactive application.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the six-month statute of limitations established by this Court in DelCostello v Teamsters, 462 U.S. 151 (1983), that propounded a new principle of law and that if applied retroactively would result in substantial inequity. A disparity among circuits exists with respect to whether the six month statute of limitations contained in the NLRA should be applied retroactively to pending matters which first arose when the state statutes of limitation were applied by this Court in hybrid §301 claims. Compare O. Edwards, Jr. v Teamsters Local Union No. 36, Building Material, Dump Truck Drivers, 719 F2d 1036 (9th Cir 1983) cert denied 104 S.Ct. 599 (1984) and Smith v General Motors, supra. This disparity among circuits

requires review of this matter by this Court. The Sixth Circuit Court of Appeals has held that the six-month statute of limitations of DelCostello is to be applied retroactively. As a result, Petitioner's hybrid §301 claims are time barred.

This ruling by the Court of Appeals seriously misconstrues this Court's decisions in Hanover Shoe, Inc. v United Shoe Machinery Corp., 392 U.S. 481 (1968) and Chevron Oil Company v Huson, 404 U.S. 97 (1971) regarding the prospective application of a new principle of law. A new principal of law that establishes a "clear break" from past precedent should not be applied retroactively. Furthermore, this ruling fails to consider this Court's prior decisions in International Union United Automobile, Aerospace and Agricultural Implement Workers of

America, ALF-CIO v Hoosier Cardinal Corporation, 383 U.S. 696 (1966) and United Parcel Service, Inc. v Mitchell, 451 U.S. 51 (1981) where this Court in §301 claims borrowed state law statutes of limitation, pursuant to the general rule of this Court that State law is to be applied where the Federal statute is silent. In light of this Court's directive in Chevron that a "clear break" in law should not be applied retroactively, review of the decision below is essential.

1. a. In International Union United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO v Hoosier Cardinal Corporation, supra, this Court held that §301 of the National Labor Management Relations Act 29 U.S.C. §185 did not contain its own statute of limitations. The timeliness of a §301

suit, therefore, was to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. Subsequently, in United Parcel Service, Inc. v Mitchell, supra, another §301 suit, this Court reaffirmed the Hoosier decision that the timeliness of a §301 suit was to be determined by reference to state statutes of limitation, however, held that the applicable state statute was that for vacation of an arbitration award. In DelCostello this Court noted the general rule that where Federal law was silent as to the applicable statute, state law was to provide the statute of limitations. This Court, however, held that in some cases, to protect Federal interests, statutes of limitation should be drawn from related Federal statutes. This Court in DelCostello then adopted for a §301 hybrid

unfair representation claim the six-month statute of 29 U.S.C. §160.

Following the Hoosier and Mitchell decisions, DelCostello was an unprecedented break from the general rule that if Congress failed to specifically provide a statute of limitation, analogous state law was to be applied.

b. In the DelCostello decision this Court did not specifically decide whether the new rule was to be applied retroactively. To decide whether a new rule of law should be applied retroactively this Court has in the past applied the analysis developed in Chevron Oil Company v Huson, supra. In the Chevron case this Court stated that three factors must be balanced to decide retro-activity:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g. Hanover

> Shoe Inc. v United Shoe Machinery Corp., 392 U.S. 481 at 496 or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g. Allen v State Board of Elections, supra, 393 U.S. at 572, 89 S.Ct. at 835. Second, it has been stressed that we must * * * weigh the merits and elements in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation.' Linkletter v Walker, supra, 381 U.S. at 629, 85 S.Ct. at 1738. Finally, we have weighed the inequity imposed by retroactive application, for [W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. Cipriano v City of Houma, supra, 395 U.S. at 705, 89 S.Ct. at 1900."

In the Chevron case this Court refused to apply the new statute of limitations on a retroactive basis. As in the Chevron case the new statute of limitations established in DelCostello was a new principal of law which overrode

past precedent of Hoosier, supra and Mitchell, supra, and should not be applied retroactively. As in Chevron litigants relied on the previous statute of limitations. In DelCostello, this Court did not "discover" a new principle of law in espousing the new statute of limitations. This Court rejected the general rule that the analogous state statute was to be applied in favor of the statute found in §10(b) of 29 U.S.C. §160.

Secondly, although the question of which state statute to apply in a §301 claim was previously before this Court, it is evident that the lower courts in all of the circuits had decided on a case by case basis the applicable state statute until the DelCostello decision. DelCostello has achieved a uniform federal rule, however, only inequity

would be achieved by applying DelCostello retroactively.

Applying DelCostello retroactively can only result in inequity. In those cases where DelCostello lengthened the statute of limitations, the claimants could not have been relying on the Court's decision to protect their rights. These claimants would be neither helped nor harmed by a retroactive application of the new statute. In those cases, however, where DelCostello shortened the statute of limitations upon which the claimants had been relying, the claimants would be harmed by a retroactive application of the new statute. Therefore, a retroactive application of DelCostello would only harm the interests of claimants' previously protected by this Court.

As stated by this Court in Hanover Shoe, Inc. v United Shoe Machinery Corp.,

supra, if this Court abruptly changes a rule of law, the new rule will be applied prospectively only.

CONCLUSION

The petition for a writ of certiorari should be granted.

SLOAN, BEENFIEL, FARRER & NEWTON

By: _____
James A. Sloan
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing petition for certiorari upon all attorneys of record by depositing a copy of same in the United States mail, postage prepaid, addressed to them as follows:

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This 4th day of November, 1985.

James T. Sloan

Nos. 84-115 & 84-1404

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v.

DONALD SALISBURY,

Defendant and Third Party Plaintiff-Appellant,

JACK SALISBURY,

Third Party Plaintiff,

vs.

JAMES RIVER CORPORATION, UNITED PAPERWORKERS UNION LOCAL 1010, and UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO,

Third Party Defendants-Appellees.

_____/

ORDER

BEFORE: MARTIN and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge

The plaintiff appeals the orders dismissing his federal claims for wrongful discharge under §301 of the Labor Management Relations Act, 29 U.S.C.

§185, and the alleged breach of the Union's duty of fair representation and remanding pendent state claims to the state court from which this action was removed. Both appeals were referred to this panel pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel agrees unanimously that oral argument is not required. Rule 34(a), Federal Rules of Appellate Procedure.

The plaintiff was employed by the defendant Company until August, 1982 when he was discharged for the alleged intentional destruction of Company property. He filed a grievance which the Union processed through the initial stages of the grievance procedure. The Union's Bargaining Committee, however, decided not to pursue the grievance to arbitration. Pursuant to the Union's

by-laws, the plaintiff sought review of that decision by the Union membership. Plaintiff presented his arguments at a regular membership meeting held in October, 1982, but the membership voted not to take the grievance to arbitration.

In February, 1983, a credit union filed an action in state court to collect a loan made to the plaintiff. Asserting his discharge was the reason he could not repay the loan, the plaintiff filed the present third-party action against the Company and the Local and International Unions in state court on June 1, 1983. The third-party complaint included four causes of action. Count I asserted the Company wrongfully discharged the plaintiff in violation of the collective bargaining agreement. Count II asserted the Company's handling of the discharge amounted to the intentional infliction of

emotional harm upon the plaintiff and his father who also worked for the Company. Count III asserted the discharge was retaliatory in that the Company sought to avoid the payment of workmen's compensation to the plaintiff as the result of prior injury. Count IV asserted the Union breached its duty to represent the plaintiff fairly in the grievance procedure.

The Union removed the action to the district court and filed a motion to dismiss Count IV on grounds the complaint was untimely filed under the applicable six-month statute of limitations found in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The district court agreed and dismissed Count IV. The Company then moved for dismissal of Counts I and III on the same grounds and sought summary judgment as to Count II.

The district court then entered an order granting the motion to dismiss for the reasons stated in its prior order dismissing Count IV and remanding the pendent state law claims to the state court. These appeals followed.

As an initial matter, we find it necessary to interpret the scope of the district court's order disposing of Count I, II and III. The order, which is not a model of clarity, dismissed Count I as an untimely filed cause of action under §301. The reference therein to the prior order dismissing Count IV shows the Court relied upon the §10(b) statute of limitations in so doing. Because the order makes no reference to the possible preemption of the two remaining state law claims, we conclude the district court intended to remand both Counts II and III to the state court for further

proceedings. Neither party argues on appeal that such remand was an abuse of the district court's discretion.

In DelCostello v Teamsters, 462 U.S. 151 (1983), the Supreme Court held the §10(b) statute of limitations applicable to the federal causes of action in a hybrid §301/unfair representation case. In Smith v General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc), this Court held the DelCostello decision was to be given retroactive application. The district court therefore did not err in applying §10(b) to this case. The primary issue on appeal thus becomes when the statute began to run under the facts of this case. Under §10(b), a cause of action accrues "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the

alleged [violation]." NLRB v Allied Products Corp., 548 F.2d 644, 650 (6th Cir. 1977). For purposes of a hybrid §301/unfair representation action, that time is when the claimant knows or should have known of the unions' alleged breach of its duty of fair representation. See Howard v Lockheed-Georgia Co., 742 F.2d 612, 614 (11th Cir. 1984); Metz v Tootsie Roll Industries, Inc., 715 F.2d 299, 304 (7th Cir. 1983), cert. denied, ____ U.S. ___, 104 S.Ct. 976, 79 L.Ed. 214 (1984); Santos v District Council of New York City, 619 F.2d 963, 969 (2d Cir. 1980). Cf. Badon v General Motors Corp., 679 F.2d 93, 99-100 (6th Cir. 1982).

The district court found the plaintiff's cause of action accrued when the membership of the Union voted in October, 1982, not to take the plaintiff's grievance to arbitration.

The plaintiff argues the statue did not start to run at that time, however, because he did not receive written notice of the union's decision. He presented no evidence to show that such written notice was required under the by-laws of the Local Union or that he was unaware of the decision at the time it was made. The record makes clear the plaintiff was present at the membership meeting and was informed of the decision on the night it was made. Under these facts, we find the district court did not err in finding the statute of limtations started to run at that time. See Howard v Lockheed-Georgia Co., 742 F.2d at 614. See also, Metz v Tootsie Roll Industries, Inc., 715 F.2d at 304. The district court properly found, therefore, that the complaint filed on June 1, 1983 was untimely under §10(b).

The plaintiff further asserts the Company waived the defense based upon §10(b) because, unlike the union, it did not raise the defense of statute of limitations in its answer to the complaint. The rule in this Circuit is that the failure to include an affirmative defense in the answer does not waive that defense if the latter clearly appears on the face of the complaint and is later raised in a motion to dismiss. Pierce v County of Oakland, 652 F.2d 671 (6th Cir. 1981). We find the §10(b) defense did appear clearly upon the face of the plaintiff's compaint. Likewise, we find the plaintiff would not be prejudiced by permitting the Company to raise the defense in a motion to dismiss. The plaintiff was put on notice that such a defense existed by the Unions' prior

motion to dismiss filed shortly after the case was removed to federal court. Thus, the plaintiff did not forego other avenues of relief in reliance upon the Company's failure to raise the defense or suffer litigational expenses in the interval. The defense was properly permitted and granted. DelCostello v Teamsters, 588 F.Supp. 902, 906 (D. Md. 1984).

It is therefore ORDERED that the district court's orders dimissing Counts I and IV of the plaintiff's complaint and remanding Counts II and II(sic) to the state court be and hereby are affirmed. Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v DONALD SALISBURY, et al.,

Defendants.

_____/

File NO: K83-322 CA

ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 23rd day of April, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

This case is before the Court pursuant to a motion to dismiss filed by the third party defendant. For the reasons expressed in this Court's Opinion dated January 12, 1984 the motion to dismiss is granted.

This case was removed to this Court

from Kalamazoo Circuit Court after the third party defendants were impleaded. The federal ground for removal was a §301 claim which is now dismissed. Therefore, pursuant to 28 U.S.C. §1447(c), this matter is remanded to the Kalamazoo Circuit Court in order for that Court to proceed on the state law claims.

IT IS SO ORDERED.

_____

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v.

DONALD SALISBURY, et al.,

Defendants and Third Party Plaintiffs,

v.

JAMES RIVERS CORPORATION, et al.

Third Party Defendants

---/

File NO: K83-322 CA

MEMORANDUM & ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 11th day of January, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

This case is before the Court pursuant to a motion to dismiss filed by

the defendant Labor Union. The labor union and the James River Corp. were impleaded by the defendant on the theory that they are liable to the plaintiff Credit Union for causing the defendant's inability to pay his debt. The defendant was discharged from employment by the James River Corp. on August 26, 1982. Defendant filed a written grievance with Local 1010 on August 28, 1982 which was pursued through the first three steps of the grievance procedure. Sometime in early October 1982 the Bargaining Committee of Local 1010 decided not to pursue defendant's grievance to arbitration.

The basis for defendant's claim against the Local is that it breached its duty of fair representation. With respect to the company defendant claims that it violated its collective bargaining agreement with the union when

it discharged defendant on August 26, 1982. Both claims are brought pursuant to the Labor Management Relations Act, §301, 29 U.,S. C.A. §185 (1947).

The Local's motion to dismiss asserts that the limitations period has run on defendant's fair representation claim. Defendant's third-party claim against the union was filed on June 1, 1983. The time when defendant knew or should have known of the union's alleged breach of its duty was, at the latest, early October, 1982. This is the period when the union decided not to pusue defendant's grievance to arbitration.[1]

The controlling case on the issue of limitations in §301 suits is Badon v General Motors Corp., 679 F.2d 93 (6th Cir. 1982) which was decided on May 25. The Badon decision made clear that in §301 actions the appropriate statute of

limitations is the six month statute provided for in §10(b). See also United Parcel Service v Mitchell, 451 U.S. 56 (1981). The six month period begins to run when the employee is barred from proceeding to the next step in the grievance procedure. Badon v General Motors Corp., 679 F.2d at 95. The defendant was informed that the union would not proceed to step 4 of the grievance procedure in September, 1982 by defendant's contention, or in early October, 1982 by the union's contention. In either case the six month period had run, as defendant filed his third-party §301 claim on June 1, 1983. Defendant's claim accrued after the Badon decision, and was filed more than six months after its accrual, therefore such claim must be dismissed as against the third-party defendant Union.

As defendant's §301 is the sole claim asserted against the union, said union is dismissed from this this case.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

FOOTNOTE

[1] The Court notes that in Defendant's third party complaint he claims the meeting wherein the union made this decision occurred in September, 1982, and he admits that he was present at that meeting. The union claims the meeting occurred on October 5, 1982.

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CASE No. 85-905

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

****

DONALD E. SALISBURY, PETITIONER

vs.

JAMES RIVER CORPORATION, AND
UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, AND LOCAL 1010
UNITED PAPERWORKERS INTERNATIONAL UNION,
RESPONDENTS

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

****

BRIEF OF RESPONDENTS UNITED PAPERWORKERS INTERNATIONAL UNION AND ITS LOCAL No. 1010 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six (6) months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made....

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari of Petitioner Donald E. Salisbury (hereinafter "Salisbury") should be denied because the facts of this case do not present an issue as to whether this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 1512 (1983), should be applied retroactively. Salisbury's action is barred in any event by prospective application of Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982).

The Petition should also be denied because no genuine split in the decisions of the U.S. Courts of Appeals is present under the facts of this case, and because Salisbury cannot show under Chevron Oil Company v. Huson, 404 U.S. 97 (1971), that DelCostello should not be given retroactive effect.

ARGUMENT

The only question presented by Salisbury's Petition for Writ of Certiorari is whether the statute of limitations of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies retroactively to bar Salisbury's action for breach of contract under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Rule 21.1(a), Rules of the Supreme Court of the United States. Since Salisbury's action is barred in any event by prospective application of the Sixth Circuit Court of Appeal's decision in Badon v. General Motors Corp., 679 F.2d 93 (1982), the facts of the instant case do not present an appropriate opportunity to consider the question of whether this Court's decision in DelCostello should be

applied retroactively.[1]

On May 25, 1982, the Sixth Circuit Court of Appeals decided in Badon that so-called "hybrid" § 301 breach of contract and unfair representation actions arising in Michigan must be brought within the six-month statute of limitations of § 10(b) of the National Labor Relations Act. This resulted from the circumstance that the state of Michigan had not adopted an arbitration statute which would apply to collective bargaining agreements. Since

[1]Respondents United Paperworkers International Union and its Local No. 1010 note also that this Court has denied certiorari in cases presenting this question on at least four occasions. Greyhound Lines, Inc. v. Wilhite, et al., ____ F.2d ____ (9th Cir. 1985), cert. denied, No. 84-2016 (slip op., Oct. 15, 1985); Saville v. Westinghouse Electric Corp., ____ F.2d ____ (3rd Cir. 1985), cert. denied, No. 84-2034 (slip op., Oct. 15, 1985); Welyczko v. U.S. Air, Inc.., 733 F.2d 239 (2nd Cir. 1984), cert. denied, 105 S.Ct. 512 (1984); Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984)

Michigan did not have a statute which might be adopted under this Court's decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the Sixth Circuit in Badon turned to § 10(b) as the appropriate statute of limitations, relying primarily upon Justice Stewart's concurring opinion in Mitchell.

As the Court of Appeals and District Court below both noted, Salisbury was discharged in August, 1982, and his cause of action against the Unions and Respondent James River Corporation (hereinafter the "Company") accrued no later than October, 1982. Thus, Salisbury's cause accrued over four months after the Sixth Circuit held in Badon that the six-month statute of limitations applies to actions of this nature. Accordingly, the facts of this case simply do not raise the only issue asserted in the

Petition for Writ of Certiorari, and the petition therefore should be dismissed.[2]

For similar reasons, no split in the decisions of the Courts of Appeals which might require review by this Court is raised under the facts of this case. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals have all applied DelCostello retroactively. See Smith v. General Motors Corp., 747 F.2d 372, 374-75 (6th Cir. 1984), and cases cited therein.

Although the Ninth Circuit has held that DelCostello should not be applied

[2]Respondent Unions note that Salisbury has failed to offer any argument before either the District Court or Court of Appeals, or in this Petition, as to why his action is not barred by Badon, even though the District Court relied exclusively on Badon, and expressly noted that Salisbury's "claim accrued after the Badon decision, and was filed more than six months after its accrual...." (District Court Memorandum and Order, Jan. 12., 1984, p. 3.)

retroactively, Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984), that Court has since explained that DelCostello should not be applied retroactively when it would serve to shorten the limitations period, but that it should be applied retroactively when it would lengthen the limitations period. Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984). The Court explained that where retroactive application causes no inequity to the plaintiff, such as by extending the limitations period, DelCostello should be applied retroactively.

As noted supra, the case law in the Sixth Circuit at the time Salisbury's cause of action accrued applied the six-month statute of limitations of § 10(b). Accordingly, Salisbury could not reasonably have relied upon a longer limitations period,

and his cause would be barred even under the Ninth Circuit's reasoning in Edwards and Glover.

The Unions also agree with the Company's position, in its Brief in Response to Petition for Certiorari, that Salisbury cannot show that DelCostello should not be given retroactive effect under this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

CONCLUSION

For the foregoing reasons, Respondent Unions respectfully request that the Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I, LYNN AGEE, Attorney, hereby certify that three (3) copies of the foregoing Brief of Respondents United Paperworkers International Union and its Local No. 1010 in Opposition to Petition for Writ of Certiorari were served by first-class mail, postage prepaid, on all counsel of record at the following addresses on this 8th day of November, 1985:

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CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

* * * * * * * * *

DONALD E. SALISBURY, PETITIONER

VS.

JAMES RIVER CORPORATION, AND
UNITED PAPER WORKERS INTERNATIONAL, AFL/CIO, AND
LOCAL 1010 UNITED PAPERWORKERS, RESPONDENTS

* * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * * * * * * *

BRIEF OF RESPONDENT JAMES RIVER CORPORATION IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE ISSUE OF THE RETROACTIVE APPLICATION OF THE SIX-MONTH STATUTE OF LIMITATIONS OF §10(b) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. §160(b) IS RAISED IN THE FACTS OF THIS CASE.

II. EVEN IF THE ISSUE OF RETROACTIVE APPLICATION OF THE SIX-MONTH STATUTE OF LIMITATIONS IS RAISED IN THE FACTS OF THIS CASE, SHOULD THE STATUTE BE APPLIED RETROACTIVELY.

STATEMENT

I. Prior to Petitioner's discharge from employment the United States Court of Appeals for the Sixth Circuit decided Badon v General Motors Corp., 679 F. 2d 93 (6th Cir. 1982), holding that since the State of Michigan had not adopted an arbitration statute which applied to collective bargaining agreements, the Court would apply the limitations period of §10(b) of the National Labor Relations Act to all unfair representation actions arising in Michigan. In its decision the Sixth Circuit Court of Appeals concluded that the most appropriate statute of limitations for an unfair representation act, pursuant to the United States Supreme Court's decision in United Parcel Service, Inc. v Mitchell, 451 U.S 56 (1981) would be that of the state statute of limitations for the vacation of arbitration awards. Since Michigan had not adopted such a statute which would apply to labor contracts, however, the Sixth Circuit held that §10(b) provided the appropriate limitations period for actions arising in Michigan. The specific holding of the Supreme Court in Mitchell, of course, was superceded by the Court's decision in DelCostello v Teamsters, 462 U.S. 1512 (1983).

II. On or about February 4, 1983, Northwest Industrial Credit Union filed a Complaint against Petitioner in the District Court, 8th Judicial District of the State of Michigan. Thereafter the matter was removed to the State Circuit Court for the County of Kalamazoo, State of Michigan. On or about June 1, 1983, Petitioner initiated the present action in the Michigan Circuit Court, thereby alleging for the first time a cause of action against James River Corporation (James River) and United Paperworkers International Union (UPIU) and UPIU Local No. 1010 ("Unions"). James River and the Unions were impleaded by the Petitioner on the theory that they were liable to the Petitioner for causing his inability to pay his debt. In the Third-Party

Complaint Petitioner sets forth a claim for "wrongful discharge" (Count I), "intentional infliction of emotional distress" (Count II), and "retaliatory discharge" (Count III) as against James River Corporation, and "unfair representation" (Count IV) as against the Unions. The matter was removed to the United States District Court for the Western District of Michigan, Southern Division. James River answered and filed its Motion to Dismiss or for Summary Judgment as to Counts I, II, and III of the Third Party Complaint. The District Court granted James River's Motion pursuant to an Order dated April 23, 1984.[1]

The Union is the exclusive bargaining representative for the production and maintenance employees at James River's paperboard packaging manufacturing facility in Kalamazoo, Michigan. As exclusive bargaining representative, the Union has entered into a Collective Bargaining Agreement (the "Agreement") with James River. This Agreement provides for a four-step grievance and arbitration procedure for the resolution of all disputes arising under the terms of the Agreement. Until on or about August 13, 1982, the Petitioner was employed by James River and was subject to the terms of the Agreement. On that date, he was suspended by James River and subsequently discharged, on the grounds of deliberate destruction of Company property. The Petitioner initiated the grievance procedure of the Agreement, and at the fourth step of the grievance procedure the Union's Bargaining Committee decided not to pursue

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[1]Respondent James River respectfully disagrees with the conclusion reached by the Sixth Circuit Court of Appeals that the District Court Judge intended to remand Counts II and III to the state court for further proceedings. The District Court's Order states that the "case is before the Court pursuant to a Motion to Dismiss filed by the Third Party Defendant. For the reasons expressed in this Court's Opinion dated January 12, 1984, the Motion to Dismiss is granted"; Third Party Defendant James River's Motion granted by the District Court Order prays "that an Order be entered . . . dismissing the Third Party Complaint against Defendant James River . . ."

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Petitioner appealed the Bargaining Committee's decision to the membership of the local union, but after a full discussion of the merits of the grievance Local membership made a final decision, by a vote of 30 to 19, not to take Petitioner's grievance to arbitration. The Petitioner was present when the final membership vote was tallied and announced on that date. The Petitioner commenced his action against the Unions and James River more than seven months after the final resolution of this dispute.

REASONS FOR DENYING THE PETITION

Respondent does not agree with Petitioner's assertion that an appropriate question is presented in this matter as to whether the decision by the Supreme Court in DelCostello v. Teamsters, 462 U.S. 1512 (1983), should be applied retroactively, since the District Court below did not rely on that case for its decision, but rather relied on Badon v. General Motors Corp., 679 F. 2d 93 (6th Cir. 1982). In Badon, which was decided before Petitioner was even discharged by James River, the Court held that since the State of Michigan

had not adopted an arbitration statute which applied to collective bargaining agreements, the Court would apply the limitations period of §10(b) of the National Labor Relations Act to all unfair representation actions arising in Michigan.[2] Since Petitioner's action did not accrue until several months after the Badon decision, the District Court was not required to rely on the DelCostello decision or address the retroactivity issue.

To the extent that the retroactivity of DelCostello is an appropriate issue herein, Respondent contends that that decision should be given retroactive effect. In Smith v General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc) the Sixth Circuit Court of Appeals followed the majority of the Courts ot Appeals which have considered the question and expressly held that DelCostello should be applied

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[2]In Badon, the Court held that the most appropriate statute of limitations for an unfair representation action, pursuant to the Supreme Court's decision in United Parcel Service, Inc v. Mitchell, 451 U.S. 56 (1981), would be that of the state statute of limitations for the vacation of arbitration awards. Since Michigan had not adopted such a

statute which would apply to labor contracts, however, the Sixth Circuit held that §10(b) provided the appropriate limitations period for actions arising in Michigan. The specific holding by the Supreme Court in Mitchell, of course, was superseded by the DelCostello decision.

retroactively. See Perez v. Dana Corp., 718 F. 2d 581 (3d Cir. 1983); Edwards v. Sea-Land Service, Inc., 720 F. 2d 857 (5th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F. 2d 1247 (11th Cir. 1983).

Only one Court of Appeals has declined to apply DelCostello retroactively. See Edwards v. Teamsters Local No. 36, 719 F. 2d 1036 (9th Cir. 1983), cert. denied, 104 S. Ct. 1599 (1984). The Court based that decision upon earlier 9th Circuit case law which established a three-year limitations period for actions against unions for breach of the duty of fair representation. Since, as discussed supra, the case law established in the Sixth Circuit at the time the Salisbury cause of action accrued applied the §10(b) limitations period, Respondent submits that the reasoning of Edwards is not applicable herein.

It is also clear that Salisbury in the instant matter cannot meet the criteria established by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for denying retroactive application to its decisions. On April 20, 1981,

long before Petitioner had even been discharged by the Company, the Supreme Court decided in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), that the relatively short state statutes of limitations for the vacation of arbitration awards should be applied to actions of this nature. The concurring opinion by Justice Stewart in that case clearly foreshadowed that the longer limitations period of §10(b) might also be applied.

In addition, as discussed supra, the Sixth Circuit decided in Badon, prior to Petitioner's discharge by the Company, that the §10(b) limitations period would apply to unfair representation actions arising in Michigan. Accordingly, it cannot be said that Petitioner could reasonably have relied on pre-DelCostello case law establishing a longer statute of limitations, as required by Huson, to counter the general rule that Supreme Court decisions are to be applied retroactively. Accordingly, any prejudice which inures to Petitioner by the application of the §10(b) limitations period is not caused by the retroactive

application of the DelCostello decision, but rather by his own delay.

CONCLUSION

For the foregoing reasons Respondent James River Corporation respectfully requests that the Petition for Writ of Certiorari be denied.

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